

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

vs.

CIVIL NO. 11-1132 RB/LFG

BOK FINANCIAL CORPORATION
dba Bank of Albuquerque,

Defendant.

ORDER ON PRODUCTION OF DOCUMENTS
BY BANK OF THE WEST

THIS MATTER came before the Court on Equal Employment Opportunity Commission's ("EEOC") Motion for Protective Order concerning documents subpoenaed by BOK Financial Corporation ("BOK") from Bank of the West [Doc. 42]. The Court found that a proper Fed. R. Civ. P. 45 subpoena was served by BOK on Elizabeth Morantes' ("Morantes") present or prior employer, Bank of the West. [Doc. 69].

Subsequent to service of the subpoena on Bank of the West, EEOC improperly interfered and directed Bank of the West not to comply with the subpoena. EEOC's conduct was sanctionable. However, noting that to the extent EEOC claimed it was improper for BOK to subpoena the entirety of Morantes' personnel file, instead of determining whether particular documents in the file were or were not subject to privacy considerations, the Court directed that Bank of the West submit its file to the Court for an *in camera* review. In accord with the Court's directive, Bates stamped documents BOTW000001 through BOTW000132 were submitted to the Court. The Court has since completed its review, and now orders that some documents within Morantes' file be withheld, but that all remaining documents be produced

Analysis.

Simply because a document appears in a personnel file is no guarantee that the document is entitled to an expectation of privacy. The right to confidentiality of matters contained in personnel files is not absolute. Denver Policemen's Protective Ass'n v. Lichtenstein, 660 F.2d 432, 435 (10th Cir. 1981). In determining whether particular documents in a file should be produced, courts engage in a three-prong examination. Id. A court should determine if there is a legitimate expectation of privacy, if disclosures serve a compelling interest, and if disclosure can be made in some other, less intrusive manner. Id.

The Court may order that the documents not be produced at all; may direct that the information be obtained from some other less intrusive source; or may place limitations on the requester's need. Koch v. Koch Indus., Inc., 203 F.3d 1202, 1238 (10th Cir. 2000); Burka v. U.S. Dep't of HHS, 87 F.3d 508, 517 (D.C. Cir. 1996).

Having completed its *in camera* review of the documents, and considering the Lichtenstein and Kocy factors, the Court rules as follows:

<u>BATES NUMBER</u>	<u>DOCUMENT DESCRIPTION</u>	<u>PRODUCE</u>	<u>DO NOT PRODUCE</u>	<u>ANALYSIS</u>
BOTW:				
000001 - 000006	Morantes' Employment Application with privacy redactions	X		Is relevant to Morantes' efforts to mitigate damages. Any right of privacy is outweighed by BOK's right to discover evidence relevant to claims and defenses. Fed. R. Civ. P. 26

000007	Employee New Hire verification	X		Shows Morantes' salary on employment. Is relevant to issues concerning mitigation. Any right of privacy is outweighed by BOK's right of production
000008	Employee Emergency Information and Personal Profile		X	Is not relevant under Rule 26. Concerns emergency contact information. Morantes' right of privacy outweighs any right to production
000009 - 000014	Morantes' Employment Application with redactions	X		Is relevant under Rule 26. Shows efforts at securing employment and contains information relevant to Morantes' skills, abilities and education. Any right of privacy is outweighed by BOK's right to discovery.
000015 - 000016	Bank of the West's letter offering employment	X		Is relevant to show Morantes' efforts to mitigate damages. Any right of privacy is outweighed by BOK's right to discovery under Rule 26.
000017	Welcome to Bank of the West's letter to new employees		X	Not relevant to lawsuit. Is a welcome letter outlining employer-employee information.
000018	Human Resources Document Barcode		X	Not relevant to lawsuit.
000019 - 000026	Branch Sales Manager Annual Performance Evaluation	X		Is potentially relevant, as it shows adherence to employer's rules and regulations. Any privacy right is outweighed by BOK's right to discovery under Rule 26.

000027 - 000028	Invitation to Self-Identify protected status	X		These documents are relevant to whether Ms. Morantes is a member of a protected class. Relevant under Rule 26. Any claim of privacy is outweighed by BOK's right to discovery.
000029	LexisNexis criminal history check		X	Not relevant to lawsuit.
000030	Human Resources Document Barcode		X	Not relevant to lawsuit.
000031	Payroll Direct Deposit Sign Up (Employee)		X	Contains sensitive account information and is not relevant to any issue in this litigation.
000032	Unknown		X	This is a blank page. It is not relevant.
000033	Human Resources Document Barcode		X	Not relevant to lawsuit.
000034	Unknown		X	This is a blank page. It is not relevant.
000035	Payroll Direct Deposit Sign Up (Employee)		X	Contains sensitive banking information and is not relevant to any issue in this case.
000036	Unknown		X	This is a blank page. It is not relevant.
000037	Copies of voided checks for Payroll Direct Deposit		X	No relevant to any issue in the case and contains sensitive banking information.

000038	Unknown		X	This is a blank page. It is not relevant.
000039	Form W-4 (2011)		X	Indicates the number of deductions for withholding. Is not relevant to any issue in this case.
000040	Employee New Hire form	X		Verifies Morantes' job, title and salary. It is relevant to the issue of mitigation. Any privacy interest is outweighed by BOK's right to discovery.
000041	Form W-4 (2011)		X	Relates only to numbers of exemptions claimed. Is not relevant to any issue in this case.
000042	Form I-9 Employment Eligibility Verification	X		It is relevant as it demonstrates Morantes' eligibility for employment.
000043 - 000044	Form I-9 Employment Eligibility Verification forms		X	Both are identical copies of 000042.
000045	Human Resources Document Barcode		X	Is not relevant to any issue in the case.
000046	Life and Accidental Death and Dismemberment Insurance Beneficiary Designation Form		X	Is not relevant to any issue in the case.
000047 - 000053	Bank of the West Confidential Information Agreement		X	Deals with the working relationship and confidential matters between the Bank and Morantes. Is not relevant to any issue in this case.
000054	Applicant Questions concerning eligibility and restrictions on employment	X		Has arguable relevancy concerning efforts to obtain employment. Any privacy issues are outweighed by BOK's right to discovery.

000055 - 000088	Photocopies of Earning Statements and payroll drafts		X	Salary information is relevant, but these documents contain specific information on withholding, social security tax, Medicare and other deductions. The deductions are not relevant and yearly salary information is available from other sources.
000089	2011 W-2 and Earnings Summary	X		Is relevant to demonstrate mitigation obligations. Privacy rights are outweighed by BOK's right to discovery under Rule 26.
000090 - 000091	Employee Profile sheet showing recruitment, cost of recruitment and verification of application information		X	Not relevant to issues in this case.
000092 - 000094	History Time Code Scan - shows hours of employment and assigned days off		X	Not relevant to issues in this case.
000095	Requisition Profile for Customer Services Asst. Manager position [Grade 04] (page 1 of 3-page document)		X	Page one does mention Morantes, but names applicants for job who were disqualified. Is not relevant to issues in this case.
000096 - 000097	Requisition Profile (cont.) (pages 2 and 3 of 000095)	X		These two pages identify job specifications, required experience and a position summary. Is relevant to the obligation of mitigation. Page 3 shows salary range. There is no right of privacy, as it is not Morantes document.
000098 - 000100	Morantes' Resume (1998 - 2008)	X		Is relevant to show prior employment, skills, abilities and education. Any right of privacy is outweighed by BOK's right to discovery.
000101 - 000103	Morantes' Resume (2000 - Present)	X		Same as above

000104 - 000105	Candidate Profile		X	Internal document to verify Bank of the West's employment procedures were followed. Is not relevant to any issue in this case.
000106	Dart Cover Sheet		X	Appears to be a transmittal form. Is not relevant to any issue in this case.
000107 - 000112	Branch Sales Manager Annual Performance Evaluation of Morantes 2012	X		Is relevant to show Morantes' performance of job responsibilities. Any privacy interest is outweighed by BOK's right of discovery.
000113	Introductory Period Report and evaluation	X		Demonstrates Morantes' meeting all employment expectations. Its potential relevancy is outweighed by any right of privacy.
000114	Payroll Direct Deposit Sign Up		X	Is not relevant to any issue in the case, and contains sensitive financial information.
000115 - 000117	Finance Center ID Request Form		X	Is not relevant to any issue in the case.
000118	Accounts Payable P-Card Enrollment Form		X	Is not relevant to any issue in the case.
000119 - 000123	New Employee Checklist		X	Is not relevant to any issue in the case.
000124 - 000125	Employee Acknowledgment of Safe Deposit Access Procedures		X	Is not relevant to any issue in the case.
000126 - 000127	Dual Control Procedures Acknowledgment		X	Is not relevant to any issue in the case.

000128	Accounts Payable P-Card Form		X	Is not relevant to any issue in the case.
000129	Bank's information sheet on Salary Information, Working Hours, Human Resources Practices and Benefits signed by Morantes		X	Not relevant to claims and defenses.
000130	Requisition Profile for Branch Sales Manager [Grade 09] position (page 1 of 3-page document)		X	Contains names of individuals who were disqualified for the position, but shows that Morantes accepted the position
000131 - 000132	Requisition Profile (cont.) (pages 2 and 3 of 000130) shows job description summary and salary range	X		Shows position accepted by Morantes. Relevant to mitigation responsibilities. Any privacy expectation is outweighed by BOK's right to discovery.

The Court is setting aside those documents in the column "Do Not Produce." The Court will release all other documents to BOK after notification by the Court's administrative assistant to retrieve them from chambers.

IT IS SO ORDERED.

Lorenzo F. Garcia
Lorenzo F. Garcia
United States Magistrate Judge